BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

IGNACIO RIVERA	)	
Claimant	)	
	)	
V.	)	
	)	
CARGILL MEAT SOLUTIONS CORP.	)	
Respondent	)	Docket No. 1,055,106
	)	
AND	)	
	)	
CHARTIS CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 25, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on January 7, 2016. Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

This matter was originally before the Board regarding the ALJ's February 9, 2015, Award. In its decision of July 28, 2015, the Board remanded the matter to the ALJ:

> At the oral argument of this matter before the Board held June 9, 2015, the parties were first made aware that a joint stipulation of medical records, which included the medical records of Drs. Alexander Neel and Alok Shah, was not received into the evidentiary record before the ALJ. The parties agreed it was their intention for the ALJ to review this evidence prior to making an award of compensation. The parties filed a Stipulation of Medical Records with the Board on June 23, 2015, which included the medical records of Drs. Neel and Shah. That filing has been received and accepted by the Board, and the attached medical records are now a part of the evidentiary record.
>
> For reasons unknown by all involved, the ALJ was not allowed the opportunity to adequately review and evaluate this claim because of the missing evidence. As

> such, this matter is remanded to the ALJ for reevaluation of the case with the inclusion of the previously excluded evidence.[1]

After reviewing the additional evidence, the ALJ found claimant's accidental injury arising out of and in the course of his employment on July 10, 2010, resulted in a 24 percent impairment to his left upper extremity at the level of the shoulder.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues he is entitled to a functional impairment of 23 percent to the body as a whole.

Respondent argues the opinions of treating physicians Drs. Neel and Shah should be adopted in determining claimant's functional impairment, resulting in a zero percent impairment related to claimant's left elbow and a six percent impairment related to his left shoulder.

The sole issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

On July 10, 2010, claimant injured his left arm while lifting. Claimant testified he initially injured his left arm, and the pain later went into his left shoulder. Claimant reported the incident to respondent and received medical treatment in the form of physical therapy, chiropractic treatment and medication. He underwent surgery on his left elbow and received three injections to his left shoulder. Claimant testified he continued to suffer problems with his left arm, including constant pain in his shoulder and elbow and loss of grip in his left hand, following treatment. He stated he had no issues with his left arm and shoulder prior to the July 2010 incident.

Dr. Alexander Neel examined claimant on July 23, 2010. Claimant had a full range of motion and no swelling in his left hand, though he had some fluid accumulation at the olecranon bursa at the left elbow. Dr. Neel determined claimant had olecranon bursitis and provided injections. He did not impose work restrictions. Claimant returned in August 2010 with swelling with numbness and tingling in his left hand. Dr. Neel diagnosed trigger finger in his left long finger, possible carpal tunnel syndrome, and left elbow strain. He

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[1] *Rivera v. Cargill Meat Solutions Corp.*, No. 1,055,106, 2015 WL 4716619 (Kan. WCAB July 28, 2015).

recommended work restrictions related to claimant's left upper extremity. When claimant returned on October 11, 2010, Dr. Neel recommended surgery.

Claimant underwent an olecranon bursectomy to the left elbow on February 9, 2011. Claimant continued follow up care with Dr. Neel and reported doing well until April 18, 2011, when he indicated he had shooting pain in his left arm when gripping and lifting heavy objects. Dr. Neel diagnosed claimant with left olecranon bursitis/left lateral epicondylitis and suggested therapy. He noted claimant could continue with regular work.

Dr. Neel found claimant to be at maximum medical improvement and provided an impairment opinion using the AMA *Guides* on June 15, 2011.[2] He opined:

> Because [claimant] has full range of motion, an impairment rating based on range of motion is not warranted. At the same time, he does have an occasionally symptomatic lateral epicondylitis which in the future may benefit from the administration of over the counter anti-inflammatories, a home exercise program or conceivably intermittent corticosteroid injections versus more formal treatment such as an autologus platelet injection or a formal partial epicondylectomy with debridement. I believe the medical portion of his claim should be kept open for the present. This man has been returned to any and all of his regular work duties without limitation or restrictions.[3]

Dr. Alok Shah examined claimant's left shoulder in May 2012 and provided injections and restrictions of no lifting over 10 pounds, no overhead work, and waist level work only. Claimant returned on June 6, 2012, with left shoulder pain. Dr. Shah assessed claimant with left shoulder impingement syndrome, which was slowly responding to the injections, and recommended physical therapy.

Claimant returned to Dr. Shah on March 6, 2013. Dr. Shah performed a physical examination and determined claimant had left shoulder impingement syndrome and possible rotator cuff pathology. Dr. Shah noted there was no obvious rotator cuff tear. Claimant received another injection to the left shoulder and was told to continue with his restrictions.

On April 17, 2013, claimant reported moderately severe pain in his left shoulder. Dr. Shah noted claimant was unable to undergo an MRI due to his pacemaker. After performing a physical examination, Dr. Shah determined claimant had impingement syndrome with possible supraspinatus tendinitis and developing adhesive capsulitis. Dr.

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Neel Report (June 15, 2011) at 1.

Shah recommended injections and surgical intervention. Claimant eventually declined surgery because of the risks associated with an unrelated health condition.

Dr. Shah provided an impairment opinion on August 23, 2013. He indicated the work restrictions he imposed on claimant were permanent, and claimant did not require further medical treatment. Using the AMA *Guides*, Dr. Shah opined:

> Based on [claimant's] history of injury, physical examination, x-ray and other imaging studies, in my opinion his impairment rating for left shoulder injury would be 6% for left upper extremity that would convert as [4] percent impairment rating of the whole person.[4]

Dr. Pedro Murati evaluated claimant on February 6, 2013, at claimant's counsel's request. Claimant complained of left elbow pain with grasping and lifting and left shoulder, neck, and upper back pain. After reviewing claimant's available history, medical records, and performing a physical examination, Dr. Murati provided the following impressions:

> Status post, "Excision of left olecranon bursa with cultures." Left carpal tunnel syndrome. Left shoulder rotator cuff sprain versus tear. Medial and lateral epicondylitis, left. Myofascial pain syndrome of the left shoulder girdle affecting the cervical and thoracic paraspinals.[5]

Dr. Murati recommended permanent restrictions. He further noted claimant's "current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on 07-10-10 . . . during his employment with [respondent]."[6] Dr. Murati testified it is more probable than not claimant will require future medical treatment.

Using the AMA *Guides*, Dr. Murati provided a rating opinion. He explained:

> . . . for the left carpal tunnel syndrome, using table 16, this claimant receives 10% left upper extremity impairment. For the left medial epicondylitis, this claimant receives 3% left upper extremity impairment. For the left lateral epicondylitis, this claimant receives 3% left upper extremity impairment. For the loss of range of motion of the left shoulder, using figures 38, 41, and 44, this claimant receives 8% left upper extremity impairment. These left upper extremity impairments combine for 21% left upper extremity impairment which converts for 13% whole person impairment. For the Myofascial pain syndrome affecting the cervical paraspinals, this claimant is placed in Cervicothoracic DRE category II for 5% whole person

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[4] Shah Report (Aug. 23, 2013) at 3.

[5] Murati Depo. at 15.

[6] *Id.*, Ex. 2 at 5.

> impairment. For the Myofascial pain syndrome affecting the thoracic paraspinals, this claimant is placed in Thoracolumbar DRE Category II for 5% whole person impairment.[7]

The medical treatment records related to claimant's left upper extremity injury and stipulated into evidence by the parties on June 23, 2015, reveal no notation of cervical or thoracic symptoms or complaints made by claimant. Dr. Murati testified he believed claimant's condition was chronic and stable at the time of his evaluation. Dr. Murati noted claimant received injections to the left shoulder following his February 2013 examination, which may have improved claimant's range of motion. Dr. Murati testified he could not provide a rating opinion related to claimant's shoulder without an additional evaluation. He stated the remainder of his rating opinions remain unchanged.

Dr. Vito Carabetta examined claimant on March 28, 2014, for purposes of a court-ordered independent medical evaluation. Claimant complained of constant, aching pain in his left shoulder, which worsened with any upper extremity use and remained unimproved. Dr. Carabetta reviewed claimant's available history, medical records, and performed a physical examination. He reported impressions of status-post left olecranon bursectomy and left rotator cuff tendinitis. Dr. Carabetta also recommended permanent restrictions.

Using the AMA *Guides*, Dr. Carabetta opined:

> As we consider [claimant's] left shoulder complaints, it appears that we are dealing with a relatively limited case of rotator cuff tendinitis. This is certainly not at the stage [where] a surgical intervention would be considered. Perhaps, however, as we implement physician judgment, he is about halfway to that point. If he were to have had a case of rotator cuff tendinitis that was indeed severe and upper surgical consideration, then as per Table 27 on page 61, half of the indicated 10% impairment of the left upper extremity would apply. Therefore, a 5% impairment of the left upper extremity would be appropriate for this diagnosis. As we consider the left elbow area, we do know that he has undergone an olecranon bursectomy procedure. This has compromised the left upper limb, and he has clear objectivity in terms of loss of grip strength. I would surmise that this is a direct and natural result of the injury he has had. . . . When the calculations are made, as per Table 34 on page 65, he has a calculated 33% Grip Strength Loss Index, then a 20% impairment of the left upper extremity would apply. As we next use the Combined Values Chart, we find that combination of impairment from the shoulder and elbow regions results in a 24% impairment of the left upper extremity. Based on the available information, this would be fully apportioned to the injury date of July 10, 2010 with this employer.[8]

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[7] *Id.*

[8] Carabetta IME at 5.

Claimant testified he continues to suffer constant pain in his left shoulder and elbow areas and cannot lift his left arm above the shoulder. Claimant stated he can no longer lift with his left hand due to pain in his left elbow when grabbing an object. Claimant continues to work for respondent.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(g) states:

> (g) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 2010 Supp. 44-516 states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

ANALYSIS

The ALJ adopted the opinion of the court-ordered independent medical evaluator to arrive at her opinion claimant suffers a 24 percent impairment to the left upper extremity. The Board agrees. In *Tatro v. Southwest Medical Center*,[9] the Board wrote:

> The opinion of the court-appointed physician should not be blindly adopted in all instances. The statute merely requires that the opinion of the court-appointed physician be considered.

[9] *Tatro v. Southwest Medical Center*, No. 208,331, 2000 WL 1134426 (Kan. WCAB July 28, 2000).

> The court-appointed physician should, on the other hand, be free from any bias. Where the opinions of the court-appointed physician appear otherwise consistent with the nature of the injury or injuries and appear to properly apply the AMA *Guides to the Evaluation of Permanent Impairment*, it is reasonable to adopt the opinions of the court-appointed physician.[10]

In this case, Dr. Murati included myofascial pain syndrome affecting the cervical paraspinals and thoracic paraspinals in his rating assessment. A review of the medical treatment records related to claimant's left upper extremity injury and stipulated into evidence by the parties does not support a finding of cervical or thoracic symptoms or complaints related to this injury. The Board gives little weight to Dr. Murati's assessment of impairment related to cervical and thoracic conditions.

Dr. Neel, on the other hand, opined that an impairment for loss of range of motion related to the left shoulder or elbow was not warranted. Dr. Neel's opinion that claimant has no impairment is unrealistic and is also given little weight. Dr. Shah assessed a six percent impairment for claimant's shoulder. Dr. Shah did not examine nor provide an impairment rating for claimant's documented elbow injury. As such, Dr. Shah's opinion regarding functional impairment is incomplete.

Dr. Carabetta's examination and opinions consider all aspects of claimant's left upper extremity injury and are consistent with the stipulated medical records. The Board finds Dr. Carabetta's assessment of impairment to be reasonable and adopts the same.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated August 25, 2015, is affirmed.

IT IS SO ORDERED.

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[10] *Id.* at 2.

Dated this _____ day of February, 2016.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Hon. Pamela J. Fuller, Administrative Law Judge